

Feb 11, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DAVID M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 2:18-CV-0035-JTR

ORDER GRANTING, IN PART,  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND  
REMANDING FOR ADDITIONAL  
PROCEEDINGS

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 13, 14. Attorney Lora Lee Stover represents David M. (Plaintiff); Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 12. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, IN PART**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

**JURISDICTION**

On April 30, 2015,<sup>1</sup> Plaintiff filed applications for disability insurance benefits and supplemental security income benefits, alleging disability since August 1, 2011, due to depression, anxiety, HBP (high blood pressure), bad heart,

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<sup>1</sup>While the ALJ's decision refers to the application dates as March 20, 2015, Tr. 19, 29, the record reflects application dates of April 30, 2015, Tr. 194, 201.

1 severe pain, meningitis, substance abuse, and a broken hand. Tr. 194, 201, 227.  
2 Plaintiff's applications were denied initially and upon reconsideration.

3 Administrative Law Judge (ALJ) Jesse K. Shumway held a hearing on  
4 February 8, 2017, Tr. 37-74, and issued an unfavorable decision on March 24,  
5 2017, Tr. 19-30. The Appeals Council denied review on December 8, 2017. Tr. 2-  
6 7. The ALJ's March 2017 decision thus became the final decision of the  
7 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §  
8 405(g). Plaintiff filed this action for judicial review on January 30, 2018. ECF  
9 No. 1, 4.

### 10 **STATEMENT OF FACTS**

11 The facts of the case are set forth in the administrative hearing transcript, the  
12 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
13 here.

14 Plaintiff was born on September 26, 1984, and was 26 years old on the  
15 alleged onset date, August 1, 2011. Tr. 194. He completed high school and two  
16 years of college and additionally has specialized job training in welding. Tr. 60,  
17 228. Plaintiff's disability report indicates he stopped working on August 31, 2011,  
18 because of his conditions. Tr. 227. Plaintiff stated he had no physical barriers to  
19 employment, Tr. 60, but he previously had meningitis which affected his memory,  
20 Tr. 62, and anxiety, ADHD and depression caused him to have a difficult time  
21 being around people, Tr. 64-66.

22 Plaintiff testified at the February 8, 2017, administrative hearing that he had  
23 been abstinent from illegal substances for the six months preceding the hearing  
24 (since September 2016), but had not been sober for any significant period of time  
25 prior to that date. Tr. 53. However, the record reflects Plaintiff had positive UA  
26 results as recently as October 5, 2016, and November 22, 2016. Tr. 53-54.  
27 Plaintiff explained he had been prescribed Vyvanse, an amphetamine, and  
28 Clonidine, a benzodiazepine. Tr. 54-55.

## STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

## SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that physical or mental impairments prevent him from

1 engaging in his previous occupation. 20 C.F.R. § 416.920(a)(4). If a claimant  
2 cannot do his past relevant work, the ALJ proceeds to step five, and the burden  
3 shifts to the Commissioner to show that the claimant can perform other jobs  
4 present in significant numbers in the national economy. *Batson v. Commissioner*  
5 *of Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot  
6 make an adjustment to other work in the national economy, a finding of “disabled”  
7 is made. 20 C.F.R. § 416.920(a)(4)(v).

#### 8 **ADMINISTRATIVE DECISION**

9 On March 24, 2017, the ALJ issued a decision finding Plaintiff was not  
10 disabled as defined in the Social Security Act.

11 The ALJ found at step one that Plaintiff has not engaged in substantial  
12 gainful activity since his alleged onset date. Tr. 21. At step two, the ALJ  
13 determined that Plaintiff had polysubstance abuse, a severe impairment. Tr. 22.  
14 At step three, the ALJ found Plaintiff did not have an impairment or combination  
15 of impairments that meets or medically equals the severity of one of the listed  
16 impairments. Tr. 22.

17 The ALJ assessed Plaintiff’s Residual Functional Capacity (RFC) and  
18 determined, based on his impairments, including the substance use disorders,  
19 Plaintiff could perform a full range of work at all exertional levels with the  
20 following limitations: he is limited to simple, routine, repetitive tasks; he can have  
21 no interaction with the public and limited contact with coworkers and supervisors;  
22 and he would likely be off task 10% of the workday and would miss more than two  
23 days of work each month because of his impairments. Tr. 23.

24 At step four, the ALJ determined Plaintiff could not perform his past  
25 relevant work as a welder or research assistant. Tr. 24. At step five, the ALJ  
26 determined that based on the testimony of the vocational expert, and considering  
27 all of Plaintiff’s impairments, including the substance use disorders, Plaintiff was

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1 not able to make a successful vocational adjustment to work that exists in  
2 significant numbers in the national economy. Tr. 24-25.

3 However, the ALJ determined Plaintiff's polysubstance abuse was material  
4 to the determination of disability. Tr. 29. The ALJ concluded Plaintiff has no  
5 severe, medically determinable impairments, absent consideration of Plaintiff's  
6 substance use disorder. Tr. 25-29. The ALJ specifically found Plaintiff continued  
7 to use a variety of intoxicating substances throughout the alleged period of  
8 disability and thus there was no extended period of sobriety sufficient to evaluate  
9 his symptoms in the absence of such use. Tr. 27. Accordingly, the ALJ  
10 determined, at step two of the sequential evaluation process, that Plaintiff was not  
11 disabled within the meaning of the Social Security Act. Tr. 29-30.

## 12 **ISSUE**

13 The question presented is whether substantial evidence supports the ALJ's  
14 decision denying benefits and, if so, whether that decision is based on proper legal  
15 standards. Plaintiff contends the ALJ erred by failing to identify that Plaintiff had  
16 severe mental impairments and by finding Plaintiff's substance abuse was a  
17 material factor contributing to the disability. ECF No. 13 at 10.

## 18 **DISCUSSION<sup>2</sup>**

19 Plaintiff asserts the ALJ erred by concluding he did not have a severe mental  
20 impairment other than substance abuse. ECF No. 13 at 13. Defendant argues the  
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22 <sup>2</sup>In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held  
23 that ALJs of the Securities and Exchange Commission are "Officers of the United  
24 States" and thus subject to the Appointments Clause. To the extent *Lucia* applies  
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in  
26 their briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161  
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not  
28 specifically addressed in an appellant's opening brief).

1 ALJ properly assigned substantial weight to the testimony of non-examining  
2 medical expert Glenn Griffin, Ph.D., to find Plaintiff did not have a severe  
3 impairment, absent substance abuse. ECF No. 14 at 4-9.

4 The Social Security Act bars payment of benefits when drug addiction  
5 and/or alcoholism (DAA) is a contributing factor material to a disability claim. 42  
6 U.S.C. §§ 423(d)(2)(C), 1382c(a)(3)(J); *Sousa v. Callahan*, 143 F.3d 1240, 1245  
7 (9th Cir. 1998). When there is medical evidence of substance abuse, the ALJ must  
8 conduct a DAA analysis and determine whether DAA is a material factor  
9 contributing to the disability. 20 C.F.R. §§ 404.1535(a), 416.935(a). In order to  
10 determine whether DAA is a material factor contributing to the disability, the ALJ  
11 must evaluate which of the current physical and mental limitations would remain if  
12 the claimant stopped using drugs or alcohol, then determine whether any or all of  
13 the remaining limitations would be disabling. 20 C.F.R. §§ 404.1535(b)(2),  
14 416.935(b)(2). If the remaining limitations without DAA would still be disabling,  
15 then the claimant's drug addiction or alcoholism is not a contributing factor  
16 material to his disability. If the remaining limitations would not be disabling  
17 without DAA, then the claimant's substance abuse is material and benefits must be  
18 denied. *Parra v. Astrue*, 481 F.3d 742, 747-748 (9th Cir. 2007). "The claimant  
19 bears the burden of proving that drug or alcohol addiction is not a contributing  
20 factor material to his disability." *Id.* at 748.

21 Social Security Ruling (SSR) 13-2p, 2013 WL 621536, provides guidance  
22 for evaluating whether a claimant's substance use is material to the disability  
23 determination. It instructs adjudicators to "apply the appropriate sequential  
24 evaluation process twice. First, apply the sequential process to show how the  
25 claimant is disabled. Then, apply the sequential evaluation process a second time  
26 to document materiality." *Id.* at \*6. Although SSRs do not have the force of law,  
27 they "constitute Social Security Administration interpretations of the statute it  
28 administers and of its own regulations," and are given deference "unless they are

1 plainly erroneous or inconsistent with the Act or regulations.” *Han v. Bowen*, 882  
2 F.2d 1453, 1457 (9th Cir. 1989).

3 SSR 13-2p provides that the key factor to examine in determining whether  
4 DAA is a contributing factor material to the disability determination is whether the  
5 claimant would still be found disabled if he stopped using drugs or alcohol. SSR  
6 13-2p, 2013 WL 621536 at \*4. The ALJ must project the severity of a claimant’s  
7 other impairments in the absence of DAA, and, in making this determination, the  
8 ALJ should consider medical judgments about the likely remaining medical  
9 findings and functional limitations the claimant would have in the absence of  
10 DAA. *Id.* at \*7, \*9. SSR 13-2p indicates that in cases involving physical  
11 impairments, an ALJ may consider treating or non-treating medical source  
12 opinions about the likely effects that abstinence from drugs or alcohol would have  
13 on the claimant’s impairments; however, in cases involving mental impairments,  
14 the ALJ may not consider such predictions. SSR 13-2p, 2013 WL 621536 at \*8,  
15 n.19.

16 SSR 13-2p states that “[m]any people with DAA have co-occurring mental  
17 disorders; that is, a mental disorder(s) diagnosed by an acceptable medical source  
18 in addition to their DAA. We do not know of any research data that we can use to  
19 predict reliably that any given claimant’s co-occurring mental disorder would  
20 improve, or the extent to which it would improve, if the claimant were to stop  
21 using drugs or alcohol.” *Id.* at \*9. “To support a finding that DAA is material, we  
22 must have evidence in the case record that establishes that a claimant with a co-  
23 occurring mental disorder(s) would not be disabled in the absence of DAA.” *Id.*  
24 While ALJs may seek assistance from medical experts in interpreting the medical  
25 evidence regarding the separate effects of treatment for DAA and a co-occurring  
26 mental disorder, SSR 13-2p, 2013 WL 621536 n.28, an ALJ may not rely  
27 exclusively on medical expertise and the nature of a claimant’s mental disorder to  
28 determine whether DAA is material, SSR 13-2p, 2013 WL 621536 at \*9.

1 In this case, the ALJ did not reference SSR 13-2p in the decision and relied  
2 exclusively on medical expert Griffin to find that Plaintiff's polysubstance abuse  
3 was the only medically determinable psychiatric impairment. Tr. 26-27. This  
4 methodology is inconsistent with the guidance provided by SSR 13-2p, 2013 WL  
5 621536 at \*9, and, in any event, the ALJ's step two conclusion is contrary to the  
6 weight of the record evidence. *See infra*.

7 Plaintiff has the burden of proving he has a severe impairment at step two of  
8 the sequential evaluation process. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. §  
9 423(d)(1)(A), 416.912. In order to meet this burden, Plaintiff must furnish medical  
10 and other evidence that shows he has a severe impairment. 20 C.F.R. §  
11 416.912(a). The regulations, 20 C.F.R. §§ 404.1520(c), 416.920(c), provide that  
12 an impairment is severe if it significantly limits one's ability to perform basic work  
13 activities. An impairment is considered non-severe if it "does not significantly  
14 limit your physical or mental ability to do basic work activities." 20 C.F.R. §§  
15 404.1521, 416.921.

16 Step two is "a de minimis screening device [used] to dispose of groundless  
17 claims." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). An ALJ may find  
18 a claimant lacks a medically severe impairment or combination of impairments  
19 only when this conclusion is "clearly established by medical evidence." SSR 85-  
20 28 (1985); *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th Cir. 2005). In reviewing  
21 the claimed error, the Court must consider whether the record includes evidence of  
22 a severe impairment and, if so, whether the ALJ's response to that evidence was  
23 legally correct.

24 A consultative psychiatric examination was performed by Elizabeth Koenig,  
25 M.D., on June 28, 2015.<sup>3</sup> Tr. 353-362. Dr. Koenig diagnosed Schizoaffective

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27 <sup>3</sup>The ALJ accorded Dr. Koenig's opinion "little weight" because it failed to  
28 consider the full effect of Plaintiff's ongoing substance abuse. Tr. 23. However, a



1 Disorder, Bipolar Type, multiple episodes, currently depressed versus Bipolar II  
2 Disorder, current episode depressed, mild to moderate, with mild to moderate  
3 anxious distress, psychotic symptoms and possible occasional panic (rule out due  
4 to meningitis); Attention Hyperactivity Disorder, combined presentation,  
5 provisional; polysubstance use and dependence; and rule out specific learning  
6 disorder. Tr. 360-361. Dr. Koenig specifically indicated Plaintiff “clearly has  
7 numerous challenges, not all of which can be explained by illicit drug use.” Tr.  
8 361.

9       Reviewing state agency medical professionals Leslie Postovoit, Ph.D., and  
10 Jerry Gardner, Ph.D., indicated in July 2015 and September 2015, respectively,  
11 that Plaintiff suffered from severe impairments of substance addiction disorders,  
12 anxiety disorders, and affective disorders. Tr. 89-90, 111-113. The ALJ  
13 determined the medical professionals’ opinions that Plaintiff had severe mental  
14 impairments in addition to his polysubstance abuse was not consistent with  
15 Plaintiff’s long history of substance abuse and the testimony of Dr. Griffin. Tr. 28.

16       John F. Arnold, Ph.D., completed a Psychological/Psychiatric Evaluation  
17 form on October 20, 2015.<sup>4</sup> Tr. 437-442. Dr. Arnold diagnosed Unspecified Mood  
18

19 \_\_\_\_\_  
20 review of Dr. Koenig’s report indicates Dr. Koenig fully acknowledged and  
21 considered Plaintiff’s substance abuse. Tr. 353-362.

22       <sup>4</sup>The ALJ gave “little weight” to Dr. Arnold’s “checkbox form” noting it  
23 failed to contain meaningful analysis of the impact of Plaintiff’s substance abuse  
24 and provided little explanation for the limitations described. Tr. 28. However, Dr.  
25 Arnold’s report states that Plaintiff “has had severe, chronic problems with illicit  
26 narcotic pain medications and other drugs, which has probably had a significant  
27 impact on his mental health and ability to function” and further indicates Plaintiff  
28 reported he was “in a partial recovery from opioids, but he has continued to have

1 Disorder; Rule Out Bipolar; Unspecified Anxiety Disorder; Opioid Use Disorder  
2 (severe) on Agonist Therapy; Rule Out Cannabis Use Disorder; and an anti-social  
3 personality disorder, and also assessed numerous moderate and marked work  
4 limitations. Tr. 438-439.

5 In October 2015, Dana Harmon, Ph.D., opined it was possible Plaintiff's  
6 depression, anxiety, and substance-induced dementia would persist even with a  
7 stable recovery, but also concluded there was no reliable evidence of a mental  
8 disorder distinct from the impacts of Plaintiff's chemical dependency. Tr. 28, 982-  
9 983.

10 It is apparent from the foregoing medical evidence that Plaintiff's claim of  
11 severe mental impairments, other than substance abuse, was not "groundless."  
12 *Smolen*, 80 F.3d at 1290. The record reflects mental problems sufficient to pass  
13 the de minimis threshold of step two of the sequential evaluation process. *Id.*  
14 Accordingly, the Court finds the ALJ erred in assigning substantial weight to the  
15 testimony of medical expert Griffin to find Plaintiff's polysubstance abuse was the  
16 only medically determinable psychiatric impairment. *See* SSR 13-2p, 2013 WL  
17 621536 at \*9 (in cases involving mental impairments, an ALJ may not rely  
18 exclusively on medical expertise and the nature of a claimant's mental disorder to  
19 determine whether DAA is material).

20 Pursuant to SSR 13-2p, DAA is not material "if the record is fully developed  
21 and the evidence does not establish that the claimant's co-occurring mental  
22 disorder(s) would improve to the point of nondisability in the absence of DAA."

23 There are presently no medical records showing whether Plaintiff's mental  
24 impairments improved or would likely improve in the absence of DAA. Although  
25 the Court finds the ALJ erred at step two, it is not clear from the record, as it

26 \_\_\_\_\_  
27 significant relapses and he continues to use marijuana 'pretty regularly.'" Tr. 442.  
28 Plaintiff's substance abuse was wholly considered by Dr. Arnold.

1 currently stands, whether Plaintiff's severe mental impairments, either singly or in  
2 combination, would prevent him from performing substantial gainful employment,  
3 in the absence of DAA. The Court finds this matter must be remanded for  
4 additional proceedings in order for the ALJ to take into consideration Plaintiff's  
5 mental impairments and the limitations those impairments have on Plaintiff's  
6 functionality.

### 7 **CONCLUSION**

8 Plaintiff argues the ALJ's decision should be reversed and remanded for an  
9 award of benefits or, alternatively, for additional proceedings. ECF No. 13 at 3,  
10 17. The Court has the discretion to remand the case for additional evidence and  
11 findings or to award benefits. *Smolen*, 80 F.3d at 1292. The Court may award  
12 benefits if the record is fully developed and further administrative proceedings  
13 would serve no useful purpose. *Id.* Remand is appropriate when additional  
14 administrative proceedings could remedy defects. *Rodriguez v. Bowen*, 876 F.2d  
15 759, 763 (9th Cir. 1989). Here, the Court finds that further development is  
16 necessary for a proper determination to be made.

17 As discussed above, the ALJ erred by finding Plaintiff's polysubstance  
18 abuse was his only medically determinable psychiatric impairment. Accordingly,  
19 on remand, the ALJ shall readdress step two of the sequential evaluation process.  
20 The ALJ shall then reevaluate whether Plaintiff's DAA is a "material factor"  
21 contributing to his disability, i.e., whether Plaintiff's mental impairments would  
22 disable him independent of the limitations resulting from DAA. 20 C.F.R. §§  
23 404.1535(a), 416.935(a). The ALJ shall reconsider the medical evidence of record  
24 and develop the record further by directing Plaintiff to undergo a consultative  
25 psychological examination, possibly with an individual who specializes in treating  
26 or examining people who have substance use disorder or dual diagnoses of  
27 substance use disorders and co-occurring mental disorders. *See* SSR 13-2p, 2013  
28 WL 621536 at \*11. The ALJ shall, reassess Plaintiff's statements and testimony,

1 formulate a new RFC determination, and obtain supplemental testimony from a  
2 vocational expert, if warranted. The ALJ may also take into consideration any  
3 other evidence or testimony relevant to Plaintiff's disability claim.

4 Accordingly, **IT IS ORDERED:**

5 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is  
6 **GRANTED IN PART.**

7 2. Defendant's Motion for Summary Judgment, **ECF No. 14**, is  
8 **DENIED.**

9 3. The matter is **REMANDED** to the Commissioner for additional  
10 proceedings consistent with this Order.

11 4. An application for attorney fees may be filed by separate motion.

12 The District Court Executive is directed to file this Order and provide a copy  
13 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and  
14 the file shall be **CLOSED.**

15 DATED February 11, 2019.



A handwritten signature in black ink, appearing to be "M", is written over a horizontal line.

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE